LCI International
Worldwide Telecommunications

June 9, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: CC Docket No. 96-262 and
CC Docket No. 94-1

Dear Mr. Caton:

Enclosed please find an original plus five copies of LCI International Telecom. Corp.'s comments in response to the petition by SBC, Pacific Bell and Nevada Bell for stay and for imposition of an accounting mechanism pending judicial review.

If you have any questions or require additional information, please do not hesitate to contact me at 703-714-1108.

Sincerely,

Michael B. Hazzard

enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
	)	
Price Cap Performance Review	)	
for Local Exchange Carriers	)	CC Docket No. 94-1
	)	

Comments of LCI International Telecom Corp. in Response to Petition by SBC, Pacific Bell and Nevada Bell for Stay and for Imposition of an Accounting Mechanism Pending Judicial Review

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June 9, 1997

Introduction and Summary

Across the country, incumbent LECs (including SBC) are applying under section 271 of the 1996 Telecommunications Act for permission to enter the market for interLATA toll services. At the same time, CLECs are pressing the ILECs to test platforms and establish systems necessary for the provision of individual network elements on an unbundled basis. By arresting the price reductions ordered by the Commission for access charges in interLATA toll services and by permitting ILECs to impose access charges on unbundled network elements, the stay proposed by SBC would give ILECs unwarranted and unfair cost advantages in both markets. Judicial review of the access and price cap orders will take many months, perhaps years. The market distortions that would result from a stay in effect for that length of time could not be undone by any Commission rule change after the fact. In short, then, the stay and accounting remedy requested by petitioners SBC, Pacific Bell and Nevada Bell would not avoid injury by maintaining the status quo ante; it would instead retard the development of competition in both long distance and local exchange markets.

Moreover, petitioners have not justified their request for such extraordinary and unusual relief. There is no conflict (actual or potential) between the Commission's access charge and price cap performance orders, which relate to long distance service, and the portions of the interconnection order, which relates to local service, that were stayed by the Eighth Circuit. Nor is the Commission's decision to prevent the application of access charges to unbundled network elements arbitrary or capricious. Any other

outcome would contravene Congressional intent as expressed in the language of the '96 Act itself. Similarly, the Commission's rejection of ILEC assertions that access charges ought to be raised through reductions in the productivity offset are well supported. If the outcome is adjusted at all, the X-factor should be set at a level above 6.5 percent.

Discussion

A. The Commission's Access Order and Eighth Circuit Stay of the Interconnection Order Are Not in Conflict.

SBC asserts that the Commission cannot prevent ILECs from imposing access charges on purchasers of unbundled network elements without contravening the stay by the Eighth Circuit of the TELRIC pricing rules in *Iowa Utilities Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). SBC mistakes the scope and effect of the Eighth Circuit's decision.

In *Iowa Utilities Bd.*, the court stayed the pricing rules for local interconnection because it was concerned that the Commission might have exceeded its authority under the '96 Act. 109 F.3d at 423-24. The court explained that the literal language of the Act might not justify the imposition of national pricing rules for local exchange services-an area traditionally reserved to state regulators. *Id.* at 423 ("Historically, the state commissions have determined the rates for intrastate communications services"). The court imposed the stay to "preserve the continuity and stability of th[e] regulatory system" "of private negotiation backed by state-run arbitration [that] was operating without input from the FCC" before promulgation of the pricing rules in the Commission's interconnection order. *Id.* at 427. SBC is asking, in effect, that the

Commission interpret the court's decision about state-based regulation of *intra-state* local exchange services to be a requirement that the Commission permit access charges for *inter-state* long distance to be applied to purchasers of unbundled network elements. There is nothing in the reasoning or the result of the Eighth Circuit decision to support such a construction of the stay order.

First, the pricing of access for interstate long distance communications long has been subject to national regulation by the Commission. Second, the stay order does not even mention long distance service in general or access charges in particular. Section 51.515 of the Commission's new rules (on which SBC places great emphasis) merely is cited without comment in footnotes listing all of the interconnection pricing sections to be stayed by the order. *Id.* at 421 n.3, 427 n.8. Significantly, section 51.515 by its own terms relates to access charges for both intra and interstate long distance. As a result, the court could not have left the regulation of intrastate telecommunications services unaffected by the Commission's national rules without staying that section. SBC has offered no support for its suggestion that the court also intended to limit the Commission's regulation of interstate long distance services.

B. The Commission's Decision To Preclude Assessment Of Access Charges Against Unbundled Element Purchases Is Well Reasoned And Well Supported In The Order.

SBC contends that the decision on the applicability of access charges to UNE violates the standard of competitive neutrality for universal service reform and amounts

to unreasonable discrimination in favor of unbundled element purchasers at the expense of resellers in violation of Section 202 of the Telecommunications Act. Neither argument withstands scrutiny.

SBC's argument that a loop provides the same thing to end users, access to an IXC's network, whether resold or made available as an unbundled element, attempts the functional equivalence comparison under section 202 from the point of view of the wrong user group. Those resold and unbundled loops may be "alike" from the point of view of end users, but they are not functional equivalents to competing local exchange carriers. In passing the '96 Act, Congress envisioned that CLECs would be free to combine individual elements in ways that ILECs do not use or with services that ILECs do not offer. A CLEC can do nothing with a resold loop that the ILEC is not offering already. Unbundled and resold loops therefore are not perceived as the same service to CLECs and any difference in pricing of unbundled and resold loops to CLECs that may arise as a result of the access reform order would not amount to discrimination.

The Commission's *Access Reform Order*, like the *Local Competition Order*, illustrates further the "major differences between competition through the use of unbundled elements and competition through resale of an existing retail service offered by an incumbent LEC":

> An entrant relying on unbundled elements rather than resale has the flexibility to offer all telecommunications services made possible by using network elements but also assumes the risk that end users will not generate sufficient demand to justify the investment. The entrant using a resale strategy, however, is limited to offering the retail service itself without the attendant investment risk.

[Access Reform Order ¶ 340]

Preventing access charges developed under the Commission's price cap regulation from being applied to purchasers of unbundled network elements promotes rather than hinders competitive neutrality. Under sections 252(d)(1) and 251(c)(3), Congress requires that the rate for an unbundled element be based on the cost of providing that element. Those sections further provide that the cost must be determined without reference to rate-of-return or other rate-based proceedings. In other words, unbundled elements must be priced based on actual economic costs of providing the element. The price cap rules used for setting access charges do not meet that standard.

Preventing ILECs from imposing access charges on unbundled elements will assure that ILECs seeking permission to offer interLATA toll and IXCs seeking to enter the market for local exchange services have the opportunity to compete to provide one-stop service under the same cost constraints. IXCs entering the local exchange market through an unbundled platform will pay the costs incurred by the ILEC for the elements used to build the platform that interconnects with its long distance network plus a reasonable profit to the ILEC. Those costs will compare to the costs the ILEC incurs itself for the elements it uses to interconnect with its long distance network. As the Commission has found, a contrary rule that permits access charges to be assessed against unbundled elements would impose double costs for the elements used to provide access. *First Report and Order, Access Charge Reform* CC Docket 96-262, May 16, 1997 ¶338.

C. The Commission's Order Amply Explains The PCI Reduction For The Completion Of Equal Access Amortization.

In arguing that the Commission has failed adequately to explain its decision to require an exogenous downward adjustment for fully amortized costs associated with the equal access requirements of the MFJ, the petition for stay overlooks the detailed explanation for the decision at paragraphs 307 through 314 of the order. There Commission explains that in switching to price cap regulation, it focused "primarily on the question of whether future equal access investments and expenses should be treated exogenously because equal access had been compelled by regulatory (or judicial) order." [¶307] "[B]ecause of concerns that exogenous cost treatment would create disincentives to implement equal access in an efficient manner," the Commission declined exogenous cost treatment.[*Id.*] The Commission did not focus on the distinct question whether equal access expenses that were already imbedded in BOC rates because of one-time amortization should be removed from consideration through exogenous adjustments once the amortization schedule had expired. [*Id.*] Instead, the Commission analogized the problem to the completion of depreciation of a piece of capital equipment, which ordinarily does not result in a change to the price cap index. [*Id.*] In other situations involving one-time costs subjected to an amortization schedule, which was built into the price cap index upon the switch from rate of return regulation, the Commission made a downward exogenous adjustment after expiration of the amortization schedule. [¶ 309-310] The Commission's decision to accord like treatment to comparable one-time cost situations is hardly an act of caprice. Nor does the Commission's decision to impose a

one-time adjustment to prevent past mistakes from remaining improperly imbedded in future rates amount to arbitrary conduct. *Compare Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1205 (D.C. Cir. 1996) ("[t]he one-time adjustments . . . prevented past Commission mistakes from being embedded in future rates.")

D. The Petition Fails To Justify Delay In The Reduction Of Access Charges.

Contending that the Commission's CPD (consumer productivity dividend) figure was "plucked from thin air," that its adjustment to the X-factor derives from a "selective review of the record," and that the Commission failed to "meaningfully discuss" "valid, economically-sound predictive judgments about future LEC productivity," SBC requests a stay of the 6.5 percent productivity factor in order to prevent the resulting reduction of incumbent LEC access charges. The flaw in SBC's suggestion that access charges should not be reduced can be found in SBC's own arguments about the alleged harm it will suffer if a stay is not granted. Specifically, SBC contends that emerging competition would prevent it from being able to recover the rate differential in the event the Commission's orders are overturned on appeal. [Joint Petition for Stay at 23 ("Ever-expanding competition in LEC interstate access service markets already limits the ability of LECs to raise their prices and will have an even larger effect in the future.")] Stated another way, that argument acknowledges that current access charge rates are above competitive levels. The purpose of the Commission's access reform is "to foster and accelerate the introduction of competition into all telecommunications markets." *First*

Report and Order, Access Charge Reform CC Docket 96-262, May 16, 1997 ¶1 The record and analysis reflected in the Commission's order provides ample justification for reducing access charges from their current levels toward the levels that would prevail in a competitive environment[1].

The stay requested by SBC would send access rates further from competitive levels than is currently true. SBC has requested a stay of the switch to a 6.5% X-factor. Not surprisingly, it has not requested a stay of the portion of the Commission's access reform order that eliminates the sharing provisions originally imposed when the price cap rules were adopted. Keeping the old X-factor and eliminating the sharing provisions would increase access charges, which is clearly not the result that the Commission intended.

E. The Equities Favor Immediate Implementation Of The Commission's Decision.

SBC's assertion that a stay combined with an accounting order will eliminate injury to CLECs and IXCs rests on the mistaken assumption that an after-the fact award of the access charge reductions and amounts improperly applied to the purchase of unbundled network elements together with interest would put CLECs in the same position they would occupy under immediate implementation of the Commission's access

[1] Although LCI agrees with the Commission's conclusion that access rates are above competitive levels and should be reduced, it does not concede that the X-factor selected in the First Report and Order reduces those charges far enough.

reform and price cap performance orders. That argument overlooks that much more is at stake here than the time value of money.

A stay would permit the ILECs to impose access charges on purchases of unbundled network elements throughout the months and perhaps years of judicial review of the access reform order. Those charges would permit the ILECs to recover twice for the costs arising from the provision of unbundled elements: once through cost-based rates charged for the elements, a second time through access charges ostensibly applied to recover the cost of using the same elements for interconnection with the IXC's interLATA network. The Commission has already found that such double recovery could foreclose the ability of CLECs to compete in the market for local access. [Access Charge Reform Order ¶ 337]

A stay now would impose that cost disadvantage on the CLECs at the precise moment that ILECs are making a push to enter the market for interstate long distance services and CLECs are making a push to implement local platforms based composed of unbundled network elements. There is a growing recognition of consumer preference for "one-stop" communications shopping, i.e., for one source to provide local and long distance services. To permit ILECs to apply access charges to unbundled elements would hobble CLECs at a crucial time in the development of competition to meet that consumer demand.

Similarly, a stay of the price cap review order would permit access charges to rise further above competitive levels and introduce an even greater supra-competitive price distortion into the market than presently exists. The effects of that distortion during this

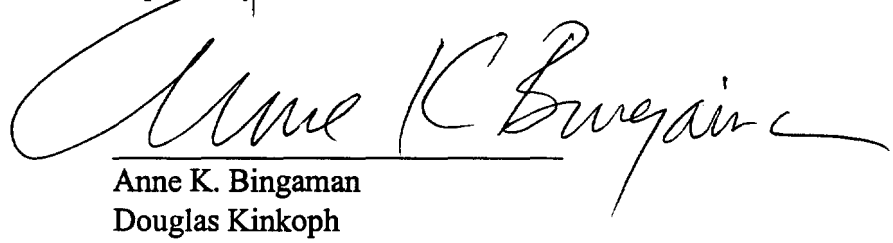
time of competitive evolution cannot easily be erased by an award of delayed price reductions.

SBC's efforts to suggest that LECs would suffer a comparable type of harm if the requested stay is not granted are not credible. The petition itself acknowledges that LECs face a growing competitive threat in markets for interstate access. [See SBC Petition for Stay at 23 ("Ever-expanding competition in LEC interstate access service markets already limits the ability of LECs to raise their prices and will have an even larger effect in the future.")] Those competitive constraints will continue to push access prices downward toward competitive levels, in the same direction that the Commission's order will push prices. The suggestion that ILECs might be able to charge higher prices for some undefined transitory period does not justify the unusual step of a stay of the Commission's access reforms.

Relief Requested

The requested stay should be denied and the Commission's orders permitted to take effect.

Respectfully Submitted,



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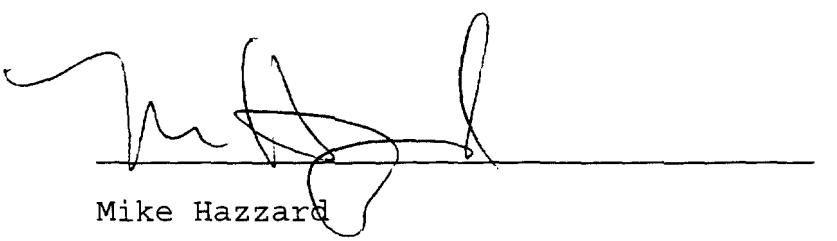
CERTIFICATE OF SERVICE

I, Mike Hazzard, hereby certify that the foregoing "Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review" has been served June 9, 1997, to the Parties of Record.



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